***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

74-2006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUSAN WAGNER LEISNER, KARIN MALINOWSKI, LINDA GEDEON, CECILIA GUROWITZ, MYROSLAWA WANIO, VICTORIA PRINCIPE, MARGARET KECK MILKMAN and JANE BOOTH, individually and on behalf of all other persons similarly situated,

Plaintiffs,

-against-

NEW YORK TELEPHONE COMPANY,

Defendant.

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P/S

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On Appeal from the United States District Court

For the Southern District of New York

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BRIEF FOR RESPONDENT-APPELLEE

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NEW YORK TELEPHONE COMPANY,

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# BRIEF FOR RESPONDENT-APPELLEE

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## STATEMENT OF THE ISSUE

The issue to be decided by this court is whether Cecilia Hurowitz should have been granted more than $600.00 from the New York Telephone Company in recompense for her participation in Leisner v. New York Telephone Co., ____ F.Supp. ____ (6 EPD 8871 SDNY 1973), and in exchange for

her agreement not to further prosecute but to settle all claims related to the action.

## STATEMENT OF THE CASE

In 1972, a class action suit charging defendant with sex discrimination in employment was commenced against the New York Telephone Company pursuant to Title VII of the Civil Rights Act of 1964 as amended 42 U.S.C. Sec. 2000e et seq.[1] After a five day full evidentiary hearing on plaintiff's motion for a preliminary injunction, the District Court certified the case as a class action, and granted the injunction barring the use of disparately applied and/or unvalidated employment criteria. 358 F.Supp. 359 (SDNY 1973)

In the eight months succeeding that hearing, the parties engaged in settlement negotiations which resulted in a Consent Decree signed by the District Court in September, 1973. (Consent Decree, Appendix, pp. A 16-36) The Decree

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1. Relief sought included: (a) an injunction against the use of discriminatory hiring and promotion criteria; (b) the establishment and/or sex desegregation of training programs to facilitate job transfers and promotions for women; (c) the imposition of goals and timetables for the hiring and promotion of women and for the desegregation of women's jobs and assignments; (d) a grant of salary increments to females promoting into better positions and back pay for them; and (e) the costs of the action and attorneys fees. (Complaint, Appendix p. 5-15).

provided for special promotional and monetary relief for incumbent named representative plaintiffs, (A 18-19), establishment of special programs for training, upgrading, and transferring of female employees, (A 20-22), introduction of stringent hiring and promotion goals and timetables, (A 23-26), forward pay (salary increments) for incumbent women hired in certain jobs from 1968 through 1972, (A 26), extensive reporting requirements, (A 27-35), and a sum of money, Para. II A & B, to counsel as fees and for the named plaintiffs in consideration of their releases from liability for the defendant, (A 19-20).

The Consent Decree did not provide any relief for women who had been employed by the Company before or during the suit but who had left before its conclusion. All relief granted was for incumbent and future female employees. The decree, additionally, did not provide for back pay to any employee, past or incumbent.

No appeal from that Decree was taken.

Several months subsequent to entry of the Decree, plaintiffs' counsel was given a check for $52,100 which represented a sum previously negotiated between counsel for the Company and counsel for plaintiffs for attorney's fees and as consideration to the named plaintiffs for their agreement to settle the action.

Plaintiffs' counsel sought an order from the District Court on disbursement of that portion of the $52,100 which was received from the defendant Company beyond the payment of counsel fees. During February and March, 1974, plaintiffs' counsel and Appellant Hurowitz's newly retained counsel submitted affidavits and memoranda to the District Court regarding distribution of the named plaintiffs' money. On March 15, 1974, the Court entered a distribution order.

Upon application of Appellant's counsel for a hearing based upon this Circuit Court's March 13, 1974 decision in City of Detroit v. Grinnell Corp., 495 F.2d 448, (2nd Cir. 1974), the District Court received evidence (May 17 and 20, 1974) from plaintiffs' counsel and Appellant's counsel and heard argument regarding distribution of the $52,100 allocated in the Consent Decree for counsel fees and the named plaintiffs. On June 12, 1974 the Court ruled that " . . . the distribution made in the Court's order of March 15, 1974 was equitable and should be adhered to." This appeal was taken from the Court's June 12, 1974 Opinion and Order.

## SUMMARY OF ARGUMENT

It is perhaps useful to begin with a reference to matters not in dispute on this appeal.

1. There is no argument made regarding the reasonableness of counsel fees received by plaintiffs' attorneys in Leisner v. New York Telephone, _____ F.Supp. ____ (6 EPD 8871, SDNY 1973). Appellant's counsel did not, in the District Court, contest the size of the fee and indeed the District Court stated:

> By way of summary, the court notes that an attorney fee of $36,300 for 789 1/2 hours of work amounts to a rate of less than $50. per hour. Given the fact that plaintiffs' counsel are pre-eminent in the employment rights field, and given the current rate for experienced well trained lawyers in this area, the hourly rate was very reasonable. At the hearing on May 17, 1974, counsel for plaintiff Hurowitz acknowledged that this was a fair rate. (A 200-201)

2. Fundamental to the understanding of this appeal is the fact that none of the plaintiffs - neither the named plaintiffs nor any of the members of their class - paid any of the counsel fees in this matter. Title VII of the Civil Rights Act of 1964, the statute pursuant to which plaintiffs brought Leisner v. New York Telephone provides that " . . . the court, in its discretion, may allow the prevailing party, other than the Commission [EEOC] or the United States, a reasonable attorney's fee as part of the costs. . . ."

42 U.S.C. § 2000e-5(k). Plaintiffs' counsel, during settlement negotiations, sought fees from the defendant Company which agreed to and did pay them. In light of that fact, there can be no dispute over which members of plaintiffs' class should pay counsel fees. None of the named plaintiffs paid any counsel fees. None of the members of the class should either. As will be explained infra, this fact alone distinguishes this case from every case cited by Appellant in support of her position.

The only matter truly in dispute below and now here on appeal is whether Appellant Hurowitz should have received more of the $15,800 ($52,100 less $36,300 in counsel fees) for her participation in and later agreement to settle the action. The Court below has held, and it is submitted, did not abuse its discretion in so doing, that the distribution to Appellant of $600 "was adequate reimbursement for her participation, risk and visibility in the instant suit." (A 201-202).

## ARGUMENT

I. Defendant, New York Telephone Company, Paid Plaintiffs' Counsel Reasonable Statutory Attorneys' Fees At The Conclusion Of Leisner v. New York Telephone Co., ____ F.Supp. ____ (6 EPD 8871, SDNY 1973).

Appellant's entire first position in her brief on appeal arguing that all members of the plaintiff class in Leisner v. New York Telephone ought to share the payment of counsel fees is premised on the erroneous assumption that the named plaintiffs or any other members of the class should or did pay the fee. In response to that argument in the Court below, the Judge ruled:

> In other words, it was contemplated by the parties to the Settlement that defendant should bear the plaintiffs' attorneys fees. The court finds that it is preferable that the defendant who agreed to do so should bear the cost of attorneys fees rather than the plaintiff class. This is especially so where the benefits conferred on plaintiffs are primarily equitable as opposed to monetary in nature. * * * The court will not now alter the burden of attorneys fees as suggested by plaintiff Hurowitz, in a manner which would shift that burden from the defendant which agreed to assume it to an unsuspecting class. (A 204, Emphasis added)[2]

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2. Appellant's Point III in her brief suggests that the March, 1974 distribution order of the District Court was technically defective because it did not distribute the whole $52,100 fund but merely the $15,800 for the named plaintiffs. Inasmuch as the June 12 Opinion and Order re-affirms the grant of $36,300 in counsel fees, (A 200-201), the full amount of $52,100 has been completely distributed.

The cases cited by Appellant in the first point of her brief are inapposite basically for one reason which makes all of the other distinctions superfluous. In every single case cited by Appellant on this point (Brief for Appellant pp. 7-8) the plaintiff had either paid his own counsel fees to pursue the action and wished to spread the cost among those who benefitted from the relief obtained, or counsel was to be paid on a contingency basis and the amount of the fees would actually diminish the plaintiff's recovery.[3] The simple fact that none of the plaintiffs in the instant case paid any money to counsel and the relief obtained by plaintiffs was not diminished by even one dollar by any counsel fees completely distinguishes this case from all of the cases on which Appellant relies. It distinguishes these cases not only on the facts, but on the whole rationale behind the "common benefit" line of cases which Appellant cites. Appellant quotes the Supreme Court in Hall v. Cole, 412 U.S. 1 (1973) as stating (Brief for Appellant, p. 8):

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3. Furthermore, two of the cases cited by Appellant, Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator and Standard Sanitary Corp., 341 F.Supp. 1077 (D.C. Pa. 1972), and City of Detroit v. Grinnell, 356 F.Supp. 1380 (SDNY 1972) have been reversed in 487 F.2d 161 (3rd Cir. 1973) and 495 F.2d 448 (2nd Cir. 1974) respectively.

> Another established exception involves cases in which the plaintiff's successful litigation confers 'a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them. . . .' '[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense.'

In the instant case, there are no "litigation expenses" or "costs" to the plaintiffs to spread proportionately among those who benefitted from this action. Pursuant to 42 U.S.C. 2000e-5(k), plaintiffs' counsel received fees from the defendant at no cost whatever to plaintiffs. Therefore neither the holding nor the rational for the cases cited by Appellant are applicable to this case.

Another reason why the cases cited by Appellant are inapposite is that they almost all deal with an established fund out of which a known class of persons are to share.[4]

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4. The only exceptions to this are Hall v. Cole, supra, and Mills v. Electric Autolite, 396 U.S. 375 (1970) which are not applicable to this case. In both of those cases, Hall being an action by a union member against his union, and Mills being a stockholders derivative action, the fees paid to counsel by the plaintiff were redeemed from the others who benefitted from the action by taking the money from the defendant which was nothing more than the sum total of all of the plaintiffs (the union being the collection of its members and the corporation being the collection of its stockholders on whose behalf the derivative suit was brought.) Of course, the main distinction between Hall, Mills and the instant case is that the plaintiffs in those cases paid money to

However, in the instant case, as the Court below held, ". . . the benefits conferred on plaintiffs are primarily equitable as opposed to monetary in nature." (A 204). As described in the Statement of the Case, supra, p. 2, the Consent Decree afforded considerable prospective relief to plaintiffs' class in the form of new jobs, training, transfers, upgrading, and promotions.[5] There being no fund of money established to which the class has been held entitled, this case is distinguishable from those cited by Appellant in

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4. (continued) bring their action which benefitted others while in the instant case plaintiffs did not pay anything to bring this action and so there are no costs to be spread among anyone.

5. The $173,745 figure attached to that injunctive relief as "the value" of the relief (A 201), is an estimated projection of the expected increased earnings of the class as a result of the Decree and its implementation over its four year duration. The notion that this projection is a fixed fund or that those specific persons who will ultimately "share" in it are or could be ascertained is completely without basis in fact or logic. Appellant would have the District Court, presumably, maintain continuing daily supervision over the operations of the Telephone Company to determine which women acquiring jobs, raises, etc. are beneficiaries of the Decree and assessing each of them some portion of their salaries to pay plaintiffs' counsel fees already separately paid for by the Company. The suggestion is so ludicrous that there is not a single Title VII employment discrimination case anywhere decided if not to say cited by Appellant which even contemplates to say nothing of orders such an undertaking by a court.

the first point of her brief.

Finally, the Second Circuit opinion in City of Detroit v. Grinnell, supra, stands for two propositions which might[6] be applicable in this case: One, the district court must hold an evidentiary hearing to determine the amount of an award of counsel fees and, two, that the amount of counsel fees should be determined fundamentally on the basis of the number of hours which counsel devoted to the case and not on the basis of a percentage of the recovery. The District court in this case fully and completely complied with both of these requirements. A hearing was held at which evidence was presented, and the determination as to counsel fees was made on the basis of the number of hours which counsel spent on the case, the quality of that representation, counsel's

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6. It is arguable that City of Detroit and Jordan v. Fusari, 496 F.2d 646 (2nd Cir. 1974) do not even require an evidentiary hearing in this case. Lindy Bros., supra at p. 169, on which these cases are based, said that a hearing was required because of the competing interests of the unrepresented members of the class who want to pay a small amount from their recovery to counsel and counsel who wants a large amount taken from those who benefitted from his work. However, in a case such as the instant one, in which the defendant pays the counsel fee and it does not diminish the plaintiffs' recovery there are no opposing interests which the hearing should resolve.

standing in the bar and in their field of expertise.[7] The Court below, having complied with the procedural requirements applicable to the settlement of this matter and the decision reached being an appropriate one, this Court should decline to reverse it.

## II. The Court Below Did Not Abuse Its Discretion In Making Its Specific Award to Appellant Hurowitz

Appellant's entire argument regarding the specific award made to her is premised again on a refusal to accept the reality of the District Court's 1973 Consent Decree. Appellant argues that she should have been awarded back pay in the main action on its merits but, like her inability to understand that the Decree did not assess fees against any class member, Appellant refuses to understand that the Decree did not provide back pay for any class member.[8]

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7. It seems odd that Mr. Fields should say that he objects to the distribution of counsel fees because of the percentage of the settlement fund that it represents. Leaving aside that there was no settlement fund, the Second Circuit in City of Detroit held that the amount of counsel fees should not be compared to the size of the recovery but rather to the number of hours spent on the case. This must be particularly true when the relief is largely injunctive.

8. It must be emphasized that no appeal was ever taken from the Consent Decree (A 16-36), in which the Court did not order any back pay.

The bulk of Appellant's brief in this Court is devoted to arguing that

> . . . it is the Appellant's contention that the Settlement Fund [$15,800 ie., $52,100 less counsel fees of $36,300] reflects an award of back pay and could not have been awarded on any other basis."
> Brief for Appellant, p. 13.

and

> Plaintiff Hurowitz is not asking for affirmative relief in terms of training or promotion, or for a salary increment. She is merely asking for her fair share of the back pay awarded.
> Brief for Appellant, p. 24.

While Appellant argues that the $15,800 given to the named plaintiffs could not be anything but back pay, the District Court specifically held that it was not back pay.

> Finally, since the Agreement of Settlement [Consent Decree] made no provision for back pay, but instead focused on future remedial practices, plaintiff Hurowitz' claim that her share of the Settlement Fund should be a function of her length of employment prior to the settlement as compared to the past employment of other named plaintiffs is simply without merit. Specific monetary awards under "II.A." were not intended as back pay or to remedy any alleged discriminatory past practices, but rather as reimbursement geared to the individual named plaintiff's role as plaintiff. As a plaintiff, Hurowitz incurred none of the harassment alleged by

> other named plaintiffs during the pendency of the litigation.[9] As a plaintiff, Hurowitz' participation was rendered useless, through her voluntary termination of employment with defendant.
> (A 202-203)

Appellant points out that back pay is an appropriate measure of damages in a Title VII action on the merits. There is certainly no dispute on that score. Title VII provides that the District Court may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . .". 42 U.S.C. 2000e-5(g) Nowhere, however, does the law mandate awards of back pay and, indeed, this case was in fact settled in 1973 without any provision for back pay. The Court approved that settlement in entering its Consent Decree.

At this point, Appellant switches grounds and seems to be arguing that "if" the Consent Decree did not order back pay for any plaintiffs, it should have.

> In Purcell v. Keane, . . . the Court said, '... it is settled law that the burden rests with the proponents of the settlement to convince the court that it is fair.' In view of

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9. Not here reproduced is a footnote regarding formal complaints of harassment made to the EEOC by other named plaintiffs who were still employed by defendant during the pendency of the main action.

> the foregoing Appellant Hurowitz contends that Attorney Rabb has not met this burden, and the District Court erred in finding that she had.
> Brief for Appellant, p. 29.

The District Court, as it has repeatedly held, was convinced that the settlement, which did not include back pay, was fair. On that basis, the September, 1973 Consent Decree was ordered. But, says Appellant, if the Court was convinced of the settlement's fairness, the Court was in error. It is too late now for Appellant, or anyone at all, to be arguing a never-docketed appeal from the September, 1973 Decree. The court approved the settlement which cannot now be modified. Cf. Hecht v. CARE, _____ F.Supp. _____ (7 EPD 9049) (SDNY 1973), and Bryan v. Pittsburgh Plate Glass Co., ____ F.2d _____ (7 EPD 9269) (3rd Cir. 1974).

The factors upon which the named plaintiffs' distribution was based were set out fully in Affidavits appearing in the Appendix at A 37-38 and A 74-117. The Court ruled that those factors were appropriate for determining distribution of the discontinuance of litigation funds (A 201-202), and that Appellant received her fair share of the money.[10]

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10. The Court summarized the measure for distribution as compensation to the named plaintiffs for their "participation, risk and visibility in the instant suit" (A 202). The Consent Decree (A 20) further describes the money as consideration for each named plaintiff's consent to settle the litigation. Taken in sum, Appellant, with the shortest tenure of any named plaintiff at the Company, who shared least in the prosecution of the action, and who indeed voluntarily resigned from the

Appellant, in her Brief at p. 15, argues that some plaintiffs who were harassed received less than some who were not; that some plaintiffs who left the Company during the litigation received more than some who stayed; etc. She is, in effect, asking this Court to weigh the factors differently from the Court below, to substitute its view for the Court below, but does not ever show that the District Court abused its discretion in its rulings on this matter.

In sum, the Court below did not award any back pay to anyone in this case. No appeal was taken from that denial of back pay. The Court did award named plaintiffs monies for their participation in and settlement of the action. Appellant has not by citation to any case argued that those monies must be distributed according to length of service, i.e., as a function of back pay. Appellant would prefer the District Court to have used length of service as the sole measure for distribution but has not argued, as she cannot, that use of another measure per se constitutes abuse of discretion. That being the standard for reversal, this Court should decline to reverse the Court below.

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10. (continued) Company before the action was even filed, suffered the least and had the least to compromise in settling the litigation.

## CONCLUSION

To the extent that Appellant is arguing that the terms of the September, 1973 Consent Decree were not satisfactory to her because no back pay was achieved for plaintiffs, her arguments are made after the time to appeal has run. Further, to the extent that the Court below was satisfied that the settlement was fair, the Appellant's discontent in itself would have been inadequate ground, even if timely expressed, for upsetting the settlement. Hecht v. CARE, supra.

Appellant has argued that the District Court should have used length of service as the measure for distributing the named plaintiffs' settlement money. She has additionally argued that even if the standard used for distributing the settlement money was correct, it should have been differently weighted so Appellant would have received more than she did. Notable in all of that argument is the absence of any authority for the proposition that the Court below abused its discretion in applying the distribution standard used. Finally, there is no showing that on the extensive factual evidence submitted

below and on the factors recited in the Order appealed from, the District Court in applying an appropriate standard for distribution abused its discretion in computing the award. Without such a showing, the order of the Court below should not be reversed.

Respectfully submitted,

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November 6, 1974

Service of 2 copies of this within
Brief is admitted this
6 day of November 1974

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